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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TERRANCE WILLIE WILSON, Defendant and Appellant.	B198168 (Los Angeles County Super. Ct. No. NA071307)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anita H. Dymant, Judge. Affirmed with modifications.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Terrance Willie Wilson appeals from a judgment entered after a jury convicted him of first degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury found true the allegations that appellant committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and that he personally used and discharged a firearm to commit the murder (§ 12022.53, subds. (b), (c) & (d).) Appellant admitted that he had suffered one prior serious or violent felony conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and that he served one prior prison term (§ 667.5, subd. (b).)

The trial court sentenced appellant to 25 years to life, doubled to 50 years to life for murder, plus 25 years for the firearm enhancement, plus 10 years for the gang enhancement, resulting in a total term of 85 years to life. The trial court struck the prison term prior. We affirm with modifications.

CONTENTIONS

Appellant contends that he was denied his right to effective assistance of counsel and that the 10-year gang enhancement must be stricken.

FACTS AND PROCEDURAL HISTORY

On August 1, 2006, Tatiana Hill (Hill) and Irving Guerra (Guerra) drove to the Parwoods Apartment complex (the complex) in Long Beach to visit Hill's girlfriend, Monique Cervantes (Cervantes). The complex is in territory claimed by the Sex, Money, Murder gang (SMM gang). The SMM gang is allied with the Rolling 20's gang, but is a rival to the Naughty Nasty gang (2Ns gang). On the way over to the complex, Hill's 16-year-old friend Davionne Myers (Myers) joined them, even though Hill suggested that it would not be a good idea since Myers was a 2Ns gang member and had previously been attacked at the complex. After parking, Hill, Guerra, and Myers were joined by Guerra's friend Smash, a Rolling 20's gang member. They waited for Cervantes in a picnic area in the complex.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Around 10:00 p.m., James Sutton, a Rolling 20's gang member also known as J-Lock, approached the group, greeted Guerra, and asked Myers where he was from. Myers quietly answered 2Ns. Sutton told Myers that some 2Ns members had crossed out Rolling 20's graffiti. Myers said he had nothing to do with it, because he had just been released from jail. Sutton then walked off. Appellant joined Sutton and spoke with him.

A man came up to Hill, Guerra, and Myers and introduced himself as Bluejay from the Original Hood gang. Myers declined to shake Bluejay's hand, which prompted him to ask Myers where he was from. Myers said "2Ns" and Bluejay walked away. Appellant came up to the group, and asked what gang they belonged to. The question irritated Guerra because appellant knew that Guerra belonged to the Rolling 20's gang and had been involved in an altercation with Guerra and Guerra's friend at the complex a few days prior. Smash said he was from Rolling 20's and Myers mumbled that he was from 2Ns. Appellant became angry and again asked Myers where he was from. Myers said he was from 2Ns. Appellant then shot Myers four times in the back, jumping up on the table at one point. He jumped down and kicked Myers in the head. Myers died from his gunshot wounds.

Guerra, Hill, and Smash ran to Hill's car, picked up Hill's brother, and drove to the hospital, where Myers had been transported by ambulance. The entire incident had been videotaped by security cameras at the complex. Security officers Michael Johanson and Matthew Dellaro, who worked at the complex, knew appellant as an SMM associate and identified him from the videotapes as the shooter. Hill and Guerra identified appellant as the shooter to police and at trial. Rolling 20's member Jovan Barber told police that on August 4, 2006, appellant told him that he had killed a 2Ns gang member at the complex. Lateeae Brown (Brown), who was the first to approach Myers after he was shot, also told police that appellant was the shooter.

Long Beach Police Department Detective Chris Zamora, a gang expert, testified that the SMM gang, which has over 100 members, has gang colors and hand signs. The SMM's gang's primary activities are committing robberies, murders, drive-by shootings,

narcotics related crimes, and possessing illegal weapons. Detective Zamora opined that the shooting was committed to benefit the SMM gang by striking fear into rival gang members and citizens, allowing the gang to commit further crimes without interference.

Appellant testified that he was not the shooter and had not been at the complex since May 2006. That evening, he had not gone out of his apartment because he was afraid of violating the terms of his parole. But, in contrast to his testimony on direct examination, he admitted on cross-examination that he was present at the incident with Guerra and Guerra's friend a few days prior to the murder at the complex. A defense witness testified that appellant was not the shooter and was not at the complex at the time of the shooting. Another defense witness testified that when she spoke to appellant on his cell phone at 10:00 p.m. she thought she heard his mother in the background, leading her to believe that appellant was at home and not at the complex.

DISCUSSION

I. Appellant's trial counsel was not ineffective

A. Standard of review

Appellant contends that his trial counsel's performance was deficient because he: (1) failed to object when the People misstated key facts underlying its theory of premeditation in closing argument; (2) conceded in his closing argument that the crime was clearly first degree murder; (3) incompetently elicited damaging identification evidence on cross-examination and exacerbated the damage in his closing argument; (4) failed to establish the proper foundation for the admission of exculpatory evidence; and (5) committed misconduct in challenging the exclusion of the exculpatory evidence. He contends his conviction must be reversed because he was prejudiced by defense counsel's individual and cumulative errors. We conclude that trial counsel was not ineffective.

In order to show ineffective assistance of counsel, the defendant must show that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and the defendant suffered prejudice such that in the

absence of counsel's failings, the result would have been more favorable to the defendant. (*In re Jones* (1996) 13 Cal.4th 552, 561-562.) We must presume that counsel's conduct falls within a wide range of reasonable professional assistance and that the challenged action might be considered sound trial strategy. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1215.) The appellate court will reverse convictions on the ground of inadequate counsel only if the record affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1051.)

B. Failure to object to the People's closing argument

Counsel may not assume facts in argument that are not in evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 732.) But we accord to counsel great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from evidence. (*Ibid*.) Rather than arguing that the People committed misconduct in its closing argument, appellant urges that defense counsel was ineffective in failing to object to various statements made by the People in closing argument. For example, appellant complains that defense counsel should have objected when the People urged that deliberation was proved by the evidence that appellant asked Myers where he was from before he shot him. Appellant takes issue with the People's argument that premeditation was proved by evidence that appellant shot Myers multiple times, and after firing the third shot, he kicked Myers, walked away, then returned and shot him for the fourth time. In particular, appellant complains that the People misstated the evidence when she played the videotape and told the jury that appellant reloaded the gun, stating: "You see that he is pulling the gun back in a grasping motion and the officers told you what the significance of that was, that you're basically reloading the gun." Rather, appellant claims, security officer Johanson merely testified that appellant kicked the victim then "did something and ran. . . ."

Our review of the People's closing argument reveals that defense counsel was not ineffective by failing to object to the statements made by the People in closing argument.

The People are accorded great latitude in drawing its conclusions from the evidence and we do not consider the challenged statements as improper fabrication. The record shows that the People played the entire videotape for the jury, pointing out the sequence of events. And, Officer Randy Sany testified that with the type of weapon used in the murder, where casings were ejected, a racking motion is necessary to put a bullet into the chamber so the gun can be fired. Therefore, the People simply applied the officer's testimony to the scene depicted in the videotape, describing appellant's actions, and any objection on appellant's trial counsel's part would have been futile. (*People v. Frye* (1998) 18 Cal.4th 894, 985.) Accordingly, trial counsel was not ineffective.

Moreover, the trial court instructed the jury that if an attorney makes a mistake as to the evidence or law during closing argument, the jury was to be governed by the evidence as it came in during the trial and the law as the trial court instructed. We presume the jury followed the trial court's instructions. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.) In any event, appellant cannot show prejudice because the evidence that appellant was the shooter was overwhelming. He was identified by Hill and Guerra as the shooter. Security officers Johanson and Dellaro identified appellant as the shooter from the videotape. Barber told police that appellant had said he killed a 2Ns gang member at the complex. And, Sutton placed appellant near the picnic area in the complex prior to the shooting.

C. Concession that the crime was first degree murder

Appellant contends that his counsel was ineffective for conceding that the crime was first degree murder because the evidence of first degree murder was not overwhelming. He complains there was no evidence that appellant had a preconceived plan to kill, that he knew Myers, or that he knew Myers was a 2Ns gang member. He also complains that no premeditation was shown by his question to Myers asking where he was from, that shooting four times is not proof of premeditation, and that the People's argument that appellant fired a fourth shot after running away then returning, was not supported by the evidence. We disagree.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice is express when there is a deliberate intent unlawfully to take away the life of a fellow creature, and implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (§ 188.) Murder of the first degree is willful, deliberate, and premeditated murder. (§ 189.) Appellant must overcome a very strong presumption that defense counsel's strategy of acknowledging the murder was of the first degree was sound trial strategy. "Recognizing the importance of maintaining credibility before the jury, [our Supreme Court has] repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt." (*People v. Freeman* (1994) 8 Cal.4th 450, 498.)

"'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

The evidence that the murder was willful, deliberate, and premeditated was very strong. The evidence showed that after speaking briefly with Sutton, appellant walked up to Hill, Guerra, and Myers, and asked what gang they belonged to, even though he knew that Guerra belonged to the Rolling 20's gang. The jury could infer that appellant asked Guerra and the entire group that question because he intended to start trouble. After Myers softly answered that he belonged to 2Ns, appellant appeared to get angry, and asked Myers again where he was from. When Myers replied 2Ns, appellant then shot Myers in the back four times, jumped on top of the table at one point, then jumped down and kicked him in the head.

Therefore, defense counsel's concession at the beginning of his closing argument that the murder was of the first degree was a reasonable trial tactic to maintain credibility

before the jury. Defense counsel did not concede that appellant was guilty of first-degree murder, but vigorously argued that appellant was not the shooter. After defense counsel's concession that the murder was first degree, he spent the remainder of his lengthy closing argument playing the videotape and arguing that it did not establish appellant's identity, focusing on inconsistencies in witness statements, and ascribing differing motivations to each witness. Accordingly, we conclude that defense counsel's representation did not fall below a objective standard of reasonableness. In any event, in light of the overwhelming evidence of appellant's guilt of first degree murder, we conclude that appellant was not prejudiced by trial counsel's concession.

D. Cross-examination of Detective Lasch

Appellant urges that his counsel was ineffective because he elicited testimony from Detective Lasch that Brown told him that appellant was the shooter. We disagree.

Courts have been reluctant to second-guess counsel where a tactical choice of questions led to damaging testimony. (*People v. Williams* (1997) 16 Cal.4th 153, 216-217.) Here, the testimony elicited by defense counsel from Detective Lasch that Brown told him appellant was the shooter was minimally damaging in light of the overwhelming identification evidence. On the other hand, defense counsel attempted to use Detective Lasch's testimony in appellant's favor by arguing that the People could have, but did not, call Brown to testify. Defense counsel argued that Brown was the first person to approach Myers as he lay dying and that even though the People knew her whereabouts, it failed to subpoena her. Therefore, defense counsel used Detective Lasch's testimony in an attempt to cast doubt on the People's case. Accordingly, we conclude that appellant's trial counsel's representation did not fall below an objective standard of reasonableness. Nor was appellant prejudiced, because the evidence that he was the shooter was overwhelming.

E. Presentation of evidence

Appellant complains that his trial counsel was incompetent in failing to establish the chain of custody for a pair of shoes, a picnic table and bench, and photos of footprints

on the picnic table and bench. He also contends his trial counsel committed errors in arguing that the evidence should be admitted. Again, we differ.

A party must lay the proper foundation or establish the chain of custody when attempting to introduce physical evidence in the record. (*People v. Baldine* (2001) 94 Cal.App.4th 773, 779.) Appellant contends that defense counsel was ineffective in laying a foundation to establish a chain of custody for shoes that defense counsel claimed were examined by Christina Pinto (Pinto), an analyst with the Los Angeles Sheriff's Department.

The record shows that Detective Lasch testified that the picnic table was inspected for fingerprints or footprints. Defense counsel asked Detective Lasch if he requested that the crime laboratory match the footprints recovered from the picnic table with shoes that were collected from appellant's residence. The trial court sustained the People's objection to the question on the basis that it assumed facts not in evidence because there was no evidence that shoes were collected. Later, the People objected to the proposed testimony of Pinto on the ground that there was no evidence that connected any shoes to appellant. When defense counsel represented that Pinto would testify that she had received the shoes from Detective Lasch, who could be recalled to testify how he obtained the shoes, the trial court pointed out that the officer who recovered the shoes from appellant's home was not scheduled to testify. The People reviewed the police reports and noted that it was unclear how photographs of the footprints were transferred to Pinto's possession and which officer recovered the shoes from appellant's residence. It also argued that the defense was not presenting the officer who had recovered the shoes. The People refused to stipulate to the chain of custody, and the trial court denied the defense motion for a continuance in order to subpoena the officer who recovered the shoes.

Appellant now accuses defense counsel of being ineffective because he failed to establish the chain of custody of the shoes, as well as the link between the picnic table, bench and photos of shoe prints. But, the record shows that the People concluded that it

was unclear from the police record how the footprint photographs were transferred to Pinto's possession or to recover the shoes. Thus, in light of that difficulty, defense counsel's conduct may not have fallen below an objective standard of reasonableness. Even assuming that defense counsel's conduct was deficient, we conclude appellant was not prejudiced. As the trial court stated, Pinto's testimony would have added only minimal value to appellant's argument that there was no physical evidence linking appellant to the scene. And, appellant did not suffer prejudice because the identification evidence was overwhelming that appellant was the shooter.

F. Behavior to the trial court

Appellant contends that defense counsel was ineffective because he shouted at the trial court, accused it of obstructing the defense, threatened to abandon appellant, and disparaged defense witnesses when the trial court refused to allow defense counsel to present Pinto's testimony. We disagree.

Attorneys have the duty to represent clients zealously within the bounds of the law, but must respectfully yield to the rulings of the court. (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126.) Appellant contends that defense counsel's behavior was unprofessional and therefore incompetent. But, defense counsel merely acted zealously in his representation of appellant. Appellant complains about his dramatic exclamation: "I cannot continue to represent this defendant. I don't have anything." But, defense counsel did not make a formal motion to withdraw. Instead, he called alibi witnesses and made a lengthy closing argument. Nor are we convinced by appellant's argument that defense counsel was ineffective because he disparaged defense witnesses as "not material" and stated that the court should just proceed to jury instructions. Again, defense counsel's exaggerated and dramatic words were meant to persuade the trial court to grant a continuance. And, as appellant concedes, the jury was outside the courtroom when defense counsel made these comments.

Finally, we do not agree that defense counsel's failure to request that the trial court question the jurors to determine if they heard the discussion even though it was outside

the courtroom, constituted ineffective assistance. There is no evidence that the jury overheard the proceedings, or that even if it did, its deliberations were affected. Nor was appellant prejudiced by defense counsel's challenged behavior in light of the overwhelming evidence that he was the shooter. Accordingly, we also find that appellant has not shown cumulative prejudicial error. (*People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692.)

II. The 10-year gang enhancement shall be stricken

The People concede appellant's point that the trial court erred in imposing a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). "[Section 186.22, subdivision (b)] establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. [Section 186.22, subdivision (b)(1)(C)] imposes a 10-year enhancement when such a defendant commits a violent felony. [Section 186.22, subdivision (b)(1)(C)] does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' (Pen. Code, § 186.22, subd. (b)(5).) Instead, [section 186.22, subdivision (b)(5)] applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) In *People v. Lopez, supra,* at page 1005, our Supreme Court held that first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22(b)(1)(C). Because appellant was sentenced to 25 years to life for first-degree murder, doubled to 50 years to life pursuant to the Three Strikes Law, the trial court erred in imposing a 10-year enhancement under section 186.22, subdivision (b).

DISPOSITION

The abstract of judgment is ordered modified to strike the 10-year enhancement imposed pursuant to section 186.22, subdivision (b)(1)(C). The trial court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ